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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 426

JOHN KIRSCHKE, ET AL.,

Appellants,

v.

THE CITY OF HOUSTON,

Appellee.

BRIEF OF APPELLEE, THE CITY OF HOUSTON, IN OPPOSITION TO APPELLANTS' APPEAL FROM THE SUPREME COURT OF TEXAS

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SUBJECT INDEX

	PAGE
Questions Presented	1
Statement of the Case	2
Argument	3
I. The Texas courts have given full hearing and consideration to the matters and law involved herein	3
Appellee by law is vested with exclusive control and jurisdiction over its streets	3
City of Houston has power to set building lines and require building permits	3
II. Refusal of the building permit was not a "taking" or "partial taking", of the subject property	5
Appendix "A"	9
Appendix "B"	12

INDEX OF AUTHORITIES

Akin v. City of Miami, 65 So. 2d 54, 55, 56 (1953)	4
American Jurisprudence, Vol. 38, Municipal Corporations, Sec. 605	5
Carr v. City of Anchorage, 235 F. 2d 780, Alaska, D.C., 114 F. Supp. 439, 440	5
City of El Paso v. Sandfelder, C. Civ. App., Tex., 118 S.W. 2d 950, 952	6
City of Tyler v. Ingram, 139 Tex. 600, 164 S.W. 2d 516, 519 (1942)	4
Claussen v. City of Luverne, 103 Minn. 491, 115 N.W. 623, 15 L.R.A. (N.S.) 861	4
Corpus Juris, Vol. 43, Section 1704, p. 928	5
Duvall v. City of Dallas, Tex. Civ. App., 27 S.W. 2d 1105	6
Edge v. City of Bellaire, 200 S.W. 2d 224, 228, Tex. Civ. App. (1947)	4
Ellis v. City of West University Place, 141 Tex. 608, 175 S.W. 2d 396, 398, 399 (1943)	4
Fifth Avenue Coach Co. v. City of New York, 221 U.S. 467, 55 L. Ed. 815, 31 S. Ct. 709 (1911)	5
Gambrell v. Chalk Hill Theatre Co., Limited, Tex. Civ. App., 205 S.W. 2d 126, 130	6

	PAGE
Halsell v. Ferguson, 109 Tex. 144, 202 S.W. 317, 321 (1918)	4
James v. City of Toledo, C. Civ. App., Ohio, 157 N.E. 309, 310, 311	4
Johnson v. Lancaster, Tex. Civ. App., 266 S.W. 565	6
Kahn v. City of Houston, S. C. Tex., 121 Tex. 293, 48 S.W. 2d 595	6
Lewis v. Texas Power and Light Co., C. Civ. App., Tex., 276 S.W. 2d 950, 956	6
McCammon and Lang Lumber Co. v. Trinity and B. V. Ry. Co., S. C. Tex., 104 Tex. 8, 133 S.W. 247, 249 (1911)	6
McQuillin, Municipal Corporations (3rd Ed.), Vol. 9, Section 26.200, p. 479	5
McQuillin, Municipal Corporations (3rd Ed.), Vol. 18, Section 53.37, pp. 237-239	5
Newton v. Highland Park, Tex. Civ. App., 282 S.W. 2d 266	4
Norris v. City of Waco, S. C. Tex., 57 Tex. 635, 643	6
Sinclair Pipeline Company v. Lipscomb, C. Civ. App., Tex., 308 S.W. 2d 584, 586	6
Sproles v. Binford, 52 S. Ct. 581, 585, 286 U.S. [illegible] 389	5
Standard Oil Co. v. City of Marysville, 49 S. Ct. 430, 431, 279 U.S. 582, 584, 586	5
State v. Richards, S. C. Tex., 301 S.W. 2d 597, 600 (1957)	5
Texas Highway Department v. Weber, 147 Tex. 628, 219 S.W. 2d 70, 72 (1950)	5
Texas Jurisprudence, Eminent Domain, Vol. 16, Sec. 11, pp. 279, 280	6
Texas Jurisprudence, Municipal Corporations, Vol. 30, Sec. 363, pp. 363, 364	6
Texas Jurisprudence, Municipal Corporations, Vol. 30-A, pp. 397-398	4

CONSTITUTIONS, STATUTES AND CHARTER PROVISIONS

Charter, City of Houston, 1958, Article II, Sections 4, 4a	3, 12
Constitution of the State of Texas, Article 1, Section 17	6
Vernon's Texas Civil Statutes, Article 1175, Sections 16, 17 and 18	3, 9

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THE CITY OF HOUSTON,

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BRIEF OF APPELLEE, THE CITY OF HOUSTON, IN OPPOSITION TO APPELLANTS' APPEAL AND STATEMENT AS TO JURISDICTION

The appellee, The City of Houston files this opposition to appellants' Appeal and Statement as to Jurisdiction.

QUESTIONS PRESENTED

The trial court sustained appellee's special exceptions contained in its answer to the effect that as a matter of law the granting or refusing of a building permit is within the police power, and a governmental function of the appellee, and therefore appellee is immune from liability for damages due to such refusal of the building permit. That the refusal of the building permit was not a "taking", or "partial taking" of the subject land. Appellants stated in open Court

that they would not amend their petition. Appellee then filed its motion to dismiss the suit or action which was granted by the trial court. There is no federal question involved here. The ordinance of appellee setting the building lines is valid and constitutional and does not violate any federal constitutional right of any of appellants. The subject property was not "taken" or "partially taken" by appellee's refusal to grant the building permit. And as a matter of law appellee is immune to any damage for refusing the permit for the reason the granting or refusing of a building permit is within the police power of the appellee, and is a governmental function of the appellee.

STATEMENT OF THE CASE

(1) The Decisions of the Texas Courts in This Case: The appellants filed suit against the appellee for damages for "taking" or "partially taking", and by damaging appellants' land by arbitrarily and unreasonably denying appellants' application to construct a building on said land. The trial court sustained appellee's eight special exceptions. The appellants then stating in open Court they would not amend their petition, the appellee presented its written motion to dismiss the suit and the trial court granted the motion and dismissed the suit. The Court of Civil Appeals affirmed the judgment. The Texas Supreme Court refused to hear the case on the ground there was no reversible error.[1]

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[1] In their Application for Writ of Error to the Supreme Court of Texas, appellees assigned nineteen points of error. By denying the application, the Texas Supreme Court approved each and all of the holdings of the Court of Civil Appeals which were assigned as error. *Firemen's and Policemen's Civil Service Commission* v. *Wells*, 157 Tex. 644, 306 S.W. 2d 895, 897 (1957).

ARGUMENT

I.

THE TEXAS COURTS HAVE GIVEN FULL HEARING AND CONSIDERATION TO THE MATTERS AND LAW INVOLVED HEREIN.

The trial court gave full consideration to appellants' petition and their alleged damages. The Court of Civil Appeals, and the Texas Supreme Court held that appellants failed to allege a cause of action. And that if appellants were wrongfully kept from making the desired improvements on the subject land, they may obtain relief by mandamus or mandatory injunction, requiring appellee to issue the requested permit.

APPELLEE BY LAW IS VESTED WITH EXCLUSIVE CONTROL AND JURISDICTION OVER ITS STREETS.

"Home Rule" cities, such as the City of Houston, have exclusive dominion, control and jurisdiction in, over and under its public streets. Article 1175, Sections 16, 17 and 18, Vernon's Texas Civil Statutes, Article II, Sections 4, 4a, of the Charter of the City of Houston, 1958. Such power includes that to lay out, establish, widen, lower, extend, and narrow the streets within the City. Section 4, Article II, 1958, Charter, City of Houston.

CITY OF HOUSTON HAS POWER TO SET BUILDING LINES AND REQUIRE BUILDING PERMITS.

The City of Houston, a "Home Rule" city, has the power to set building lines and require building permits of persons

constructing buildings within the City. Vol. 30-A, Tex. Jur., "Municipal Corporations", pages 397-398. *Newton* v. *Highland Park*, writ ref. Tex. Civ. App., 282 S.W. 2d 266; *Edge* v. *City of Bellaire*, err. ref. n.r.e., Tex. Civ. App., Gal., 200 S.W. 2d 224.

Appellants' petition does not allege actual physical invasion or appropriation of the subject property. As a matter of law the refusal of the building permit is not a "taking", or a "partial taking" of the subject property.

The statutory Article is attached as Appendix "A", and the Charter provisions as Appendix "B".

The Supreme Court of Texas, and the Courts of Civil Appeals of Texas, have held repeatedly that the granting or refusing of such permits is within the police power of a city, and is a governmental function. *Halsell* v. *Ferguson*, 109 Tex. 144, 202 S.W. 317, 321 (1918); *City of Tyler* v. *Ingram*, 139 Tex. 600, 164 S.W. 2d 516, 519 (1942); *Edge* v. *City of Bellaire*, err. ref., 200 S.W. 2d 224, 228, Tex. Civ. App. (1947), and that a city is immune from liability for damages in exercising its governmental function. *Ellis* v. *City of West University Place*, 141 Tex. 608, 175 S.W. 2d 396, 398, 399, (1943).

The same rule of law is upheld by the Supreme Courts of sister states. The exercise of the power to grant or refuse a building permit is a purely governmental function, and the municipality is immune from damage for wrongful refusal of such a permit. *Akin* v. *City of Miami*, 65 So. 2d 54, 55, 56 (1953); *Claussen* v. *City of Luverne*, 103 Minn. 491, 115 N.W. 643, 15 L. R. A. (N.S.) 861. That rule of law is clearly stated and authorities cited in *James* v. *City of Toledo*, no writ history, C. Civ. App., Ohio, 157 N.E. 309, 310,

311, and in *Carr* v. *City of Anchorage*, app. dis. w.j., 235 F. 2d 780, Alaska, D. C., 114 F. Supp. 439, 440.

That the issuance of building permits is a governmental function of a city, and therefore, the city is immune from damages is recognized as established law and is stated in Volume 9, McQuillin, "Municipal Corporations", (3rd Ed.), Section 26.200, page 479; Volume 18, McQuillin, "Municipal Corporations", (3rd Ed.), Section 53.37, pages 237-239; 43 C. J. 928, Section 1704; 38 Am. Jur., "Municipal Corporations", Section 605.

If a municipal ordinance is proper exercise of police power, a person forbidden to make a certain use of his property is not deprived of his property thereunder, without due process of law. *Fifth Avenue Coach Co.* v. *City of New York*, 221 U.S. 467, 55 L. Ed. 815, 31 S. Ct. 709 (1911); *State* v. *Richards*, S. C. Tex., 301 S.W. 2d 597, 600 (1957).

When the subject lies within the police power of the state, debatable questions as to the reasonableness are not for the courts but for the legislature which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome. *Sproles* v. *Binford*, 52 S. Ct. 581, 585, 286 U.S. 374, 388, 389; *Standard Oil Co.* v. *City of Marysville*, 49 S. Ct. 430, 431, 279 U.S. 582, 584, 586.

II.

REFUSAL OF THE BUILDING PERMIT WAS NOT A "TAKING" OR "PARTIAL TAKING", OF THE SUBJECT PROPERTY.

The subject property was not taken and applied to public use. Therefore, there was no "taking", or "partial taking" of the land. *Texas Highway Department* v. *Weber*, 147 Tex.

628, 219 S.W. 2d 70, 72 (1950); *McCammon and Lang Lumber Co.* v. *Trinity and B. V. Ry. Co.*, S. C. Tex., 104 Tex. 8, 133 S.W. 247, 249 (1911).

The "taking" within the scope of Article 1, Section 17 of the Constitution of the State of Texas, is solely the taking of property for public use under the right of eminent domain. *Norris* v. *City of Waco*, S. C. Tex., 57 Tex. 635, 643; 16 Tex. Jur., "Eminent Domain", 279, 280, Section 11; *Sinclair Pipeline Company* v. *Lipscomb*, err. ref. n.r.e., C. Civ. App., Tex., 308 S.W. 2d 584, 586; *Lewis* v. *Texas Power and Light Co.*, err. ref. n.r.e., C. Civ. App., Tex., 276 S.W. 2d 950, 956; *City of El Paso* v. *Sandfelder*, err. dis., C. Civ. App., Tex., 118 S.W. 2d 950, 952; 30 Tex. Jur., "Municipal Corporations", 363, 364, Section 363.

There was no physical invasion of appellants' property, thus, there was no "taking" of the property under Article 1, Section 17, of the Texas Constitution. *Duvall* v. *City of Dallas*, err. ref., Tex. Civ. App., 27 S.W. 2d 1105; *Johnson* v. *Lancaster*, Tex. Civ. App., 266 S.W. 565; *Kahn* v. *City of Houston*, S. C. Tex., 121 Tex. 293, 48 S.W. 2d 595; *Gambrell* v. *Chalk Hill Theatre Co., Limited*, err. ref. n.r.e., Tex. Civ. App., 205 S.W. 2d 126, 130.

Appellants, by the refusal of said building permit have not been deprived of any property. The refusal of such permit by appellee has not violated any constitutional right of appellants.

The refusal of appellee to grant the building permit was within its police power, a governmental function, and appellee is not liable for damages to appellants for refusing to issue the permit.

WHEREFORE, appellee respectfully submits that appellants' Appeal should be in all things denied.

Respectfully submitted,

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I certify that a copy of the foregoing Brief has been served upon Patterson, McDaniel and Moore, and Mr. Bennett B. Patterson, Attorneys for Appellants, by depositing same in the United States Mail with sufficient postage, duly certified, addressed to Mr. Bennett B. Patterson, 510 Citizens State Bank Building, Houston 2, Texas.

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APPENDIX "A"

16. To have exclusive dominion, control, and jurisdiction in, over and under the public streets, avenues, alleys, highways and boulevards, and public grounds of such city and to provide for the improvement of any public street, alleys, highways, avenues or boulevards by paving, raising, grading, filling or otherwise improving the same and to charge the cost of making such improvement against the abutting property, by fixing a lien against the same, and a personal charge against the owner thereof according to an assessment specially levied therefor in an amount not to exceed the special benefit any such property received in enhanced value by reason of making such improvement, and to provide for the issuance of assignable certificates covering the payments for said cost, provided that the charter shall apportion the cost to be paid by the property owners and the amount to be paid by the city, and provided further, that all street railways, steam railways, or other railways, shall pay the cost of improving the said street between the rails and tracks of any such railway companies and for two feet on each side thereof. The city shall have the power to provide for the construction and building of sidewalks and charge the entire cost of constructing of said sidewalks, including the curb, against the owner of abutting property, and to make a special charge against the owner for such cost and to provide by special assessment a lien against such property for such cost; to have the power to provide for the improvement of any such sidewalk or the construction of any such curb by penal ordinance and to declare defective sidewalks to be a public nuisance. The power herein granted for making street improvements and assessing the cost by special assessment in the manner herein stated shall not be construed to prevent any city from adopting any other

method or plan for the improvement of its streets, sidewalks, alleys, curbs, or boulevards, as it may deem advisable by its charter.

17. To open, extend, straighten, widen any public street, alley, avenue or boulevard and for such purpose to acquire the necessary lands and to appropriate the same under the power of eminent domain and to provide that the cost of improving any such street, alley, avenue or boulevard by opening, extending and widening the same shall be paid by the owners of property specially benefited whose property lies in the territory of such improvement and to provide that the cost shall be charged by special assessment and that a personal charge shall be made against any owner for the amount due by him and to provide for the appointment by the county judge or other officer exercising like or similar powers, of three special commissioners for the purpose of condemning the said lands and for the purpose of apportioning the said cost, which apportionment of said cost shall be specially assessed by the governing authorities against the owners and the property of the owners lying in the territory so found to be specially benefited in enhanced value by said special commissioners. The city shall pay such portion of such cost as may be determined by the said special commissioners, provided the same shall never exceed one third the cost, and the property owners and their property shall be liable for the balance of the same as may be apportioned by said commissioners. The city may issue assignable certificates for the payment of any such cost against such property owners and may provide for the payment of any cost in deferred payments, to bear interest at such rate as may be prescribed by the charter not to exceed eight per cent. The city may adopt any other method for the opening, straightening, widening or extending of its streets as herein

provided for as may be deemed advisable, and charge the cost of same against the property and the owner specially benefited in enchanced value and lying in the territory of said improvement, that its charter may provide. The authority to adopt any other method shall include the manner of appointing commissioners, the manner of giving notice and the manner of fixing assessments or providing for the payment of any such improvement.

18. To control, regulate and remove all obstructions or other encroachments or encumbrances on any public street, alley or ground, and to narrow, alter, widen or straighten any such streets, alleys, avenues or boulevards, and to vacate and abandon and close any such streets, alleys, avenues or boulevards, and to regulate and control the moving of buildings or other structures over and upon the streets or avenues of such city.

APPENDIX "B"

Sec. 4. Street powers.

The City of Houston shall have power to lay out, establish, open, alter, widen, lower, extend, grade, narrow, care for, sell, pave, supervise, maintain and improve streets, alleys, sidewalks, squares, parks, public places and bridges, and to vacate and close the same; and to regulate the use thereof; and to require the removal from the streets and sidewalks of all obstructions, telegraph, telephone, street railway or other poles carrying electric wires, signs, fruit stands, showcases, and encroachments of every character upon said streets or sidewalks; to vacate and close private ways. (Act of 1905.)

Sec. 4a. Power of improvement by condemnation.

The City of Houston shall also have power to open, extend, straighten, widen and improve any public street, alley, avenue or boulevard and for such purposes to acquire the necessary lands and to appropriate the same under the power of eminent domain, and to provide that the cost of improving any such street, alley, avenue or boulevard by opening, extending and widening the same shall be paid by the owners of the property specially benefited whose property lies in the territory of such improvement, and to provide that the cost shall be charged by special assessment, and that a personal charge shall be made against any owner for the amount due by him and to provide for the appointment, by the County Judge or other officer exercising like or similar powers, of three special commissioners for the purpose of condemning the said lands and for the purpose of apportioning the said cost, which apportionment of said cost shall be specially assessed by the governing authorities against the owners and the property of the owners lying in

the territory so found to be specially benefited in enhanced value by the said special commissioners. That the city shall pay such portion of such cost as may be determined by the said special commissioners, provided the same shall never exceed one-third of the cost, and the property owners and their property shall be liable for the balance of the same as may be apportioned by said commissioners. That the city may issue assignable certificates for the payment of any such cost against such property owners, and may provide for the payments of any such cost in deferred payments, to bear interest at such rate as may be prescribed by the Charter, not to exceed 8 per cent. That the city may adopt any other method for the opening, straightening, widening or extending of its streets as herein provided for as may be deemed advisable and charge the cost of same against the property and the owner specially benefited in enhanced value and lying in the territory of said improvement that its Charter may provide. That the authority to adopt any other method shall include the manner of appointing commissioners, the manner of giving notice and the manner of fixing assessments or providing for the payment of any such improvement.

The City Council shall have power to pass any and all ordinances necessary to carry out the provisions of this section. (Act of 1905, added by amendment, 1913.)